90-1752

Supreme Court, U.S.
FILED
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NO: _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ALBERT THOMAS _____ PETITIONER

vs.

BLISS & LAUGHLIN STEEL CO. ___ RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

ALBERT THOMAS PRO SE
730 EAST 155TH COURT
PHOENIX, ILLINOIS 60426
PH: 1-708-331-1069

QUESTIONS PRESENTED FOR REVIEW

1. Did the District Court commit reversible error in concluding that a Corporate Officer (Mr. William P. Daugherty, Vice President and General Superintendent) made the remarks "the company is going to keep the youngest and most educated people," causing separation of older employees, but that the remarks did not represent corporate intent or policy that violated the Age Discrimination in Employment Act?

2. Did the Seventh Circuit Court err in concluding that a pro se litigant's appeal did not present a short and concise statement of the issue on appeal?

3. Did the Seventh Circuit Court err in ruling that a three page appeal was frivolous and stated no argument or request for remedy?

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NO._____

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No. _____

IN THE

Supreme Court of the United States of America

OCTOBER TERM, 1990

ALBERT THOMAS,

Petitioner,

v.

BLISS & LAUGHLIN STEEL CO.,

Respondent,

PETITION FOR WRIT OF CERIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Albert Thomas, respectfully prays that a Writ of Ceriorari issue to review the judgement and opinion of the United States Court of Appeals for the seventh Circuit in this case.

OPINION BELOW

The unpublished opinion of the United States Court of Appeals for the Seventh Circuit and the unpublished opinion of the United States District Court for the Northern District of Illinois - Eastern Division are attached in the appendices.

JURISDICTION

The Court of Appeals' Opinion in this matter was filed on February 4, 1991. A timely Petition for Rehearing was filed on February 11, 1991. The Court of Appeals' denial of the Petition for Rehearing was issued on February 14, 1991 and is set forth in the appendices. This Court's jurisdiction is invoked under Title 28, U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The statutory provisions surrounding this case are found in the *Age Discrimination in Employment Act (ADEA),* 29 U.S.C. Section 621 *et seq.* and and *Title VII* of the *Civil Rights Act of 1964,* Section 706. 42 U.S.C. 2000(e) and 42 U.S.C. Section 1981.

STATEMENT OF THE CASE

The United States District Court For The Northern District of Illinois - Eastern Division had jurisdiction pursuant to 29 U.S.C. Section 624 *et. seq.,* 28 U.S.C. Section 1331, Title VII of the Civil Rights Act of 1964, Section 706, 42 U.S.C. Section 2000(e) *et seq.,* and 42 U.S.C. Section 1981.

On September 27, 1985, Albert Thomas was terminated from employment from Bliss & Laughlin Steel Company after 27 years of competent, continuous service. Mr. Thomas was 55 years old and the only black foreman employed by Bliss & Laughlin. Mr. Thomas was notified of his termination by Mr. William Daugherty, a company vice president and the general superintendent of the plant. Mr. Daugherty informed Mr. Thomas that he was not being terminated because of his performance, but

because "the Company had decided to go with the youngest and best educated employees." Mr. Daugherty encouraged Mr. Thomas to file for unemployment compensation and early retirement, with the assurance that the Company would provide good references and assist in any way possible if he would attempt to seek employment elsewhere.

At the time of Mr. Thomas' termination, the Company retained several foremen who were younger, less experienced, and Caucasian. Mr. Thomas complied with all conditions precedent to jurisdiction under 29 U.S.C. Section 621 *et seq.* by seeking both federal and state agency relief for age and race discrimination. On December 19, 1986, Mr. Thomas filed his Complaint at Law naming Bliss & Laughlin Steel Company as the Defendant in his Two-Court Cause. On August 18, 1989, the United Stated District Court denied summary judgement for the defendant, Bliss & Laughlin Steel Company, with respect to count 1, age discrimination, and granted summary judgement with respect to count II, race discrimination. In the trial that ensued, Mr. Thomas requested production documentation for the period of his employ which would have shown that he was the most productive foreman employed by the Company. Under oath, Company representatives testified that they could not find the documentation and admitted under oath that the only foreman for whom they could not find production documentation was Mr. Thomas. The Company also testified under oath that Mr. Thomas was removed for performance deficiencies, which again, could not be substantiated because of their alleged inability to find the documentation. On many occasions during the five day trial, Company representatives offered conflicting testimony from what they had previously stated during the taking of depositions. In spite of seemingly clear evidence of age discrimination, a

jury could not reach a verdict and both parties agreed to have the District Court Judge rule on the case.

On September 11, 1990, the United States District Court For The Northern District of Illinois - Eastern Division, despite acknowledging belief that the Company had indeed declared its plan to Mr. Thomas that it would be eliminating older employees, entered judgement for the defendant, Bliss & Laughlin Steel Company. Mr. Thomas filed his appeal timely, as a pro se litigant, for both age discrimination and race discrimination, with the United States Court of Appeals for the Seventh Circuit and, based on a Motion To Dismiss The Appeal from Bliss & Laughlin Steel Company, the United States Court of Appeals for the Seventh Circuit granted summary affirmance of the District Court's decision. A subsequent Motion to Reconsider was denied by the United States Court of Appeals for the Seventh Circuit.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted for eight very salient reasons:

1) The District Court ruled that Bliss & Laughlin Steel Company was operated by Mr. William Daugherty, a company official who was responsible for cutting back operations.

2) The Court concluded that Mr. Daugherty made a remark concerning the retention of younger and better educated employees and then subsequently terminated the plaintiff, Mr. Thomas, who was age 55.

3) The Court concluded that the remark made by Mr. Daugherty didn't represent an illegal corporate

policy which singled out Mr. Thomas because of his age.

4) The Court's ruling, unsupported by evidence in the case, that despite the statement made by the Company official responsible for operations and for determining the persons to be laid off, that Mr. Thomas was terminated from Bliss & Laughlin Steel Company for reasons other than his age.

5) The United States Court of Appeals for the Seventh Circuit found that there was a timely appeal.

6) Bliss & Laughlin Steel Company filed a Motion to Dismiss the Appeal of a pro se litigant because it lacked a table of contents, citations to legal authorities, a jurisdictional statement, references to pages of the record and other elements of form that a pro se litigant might be unaware of and that, therefore, the appeal was frivolous. The Seventh Circuit accepted the argument that the appeal was frivolous based on form rather than substance.

7) Mr. Thomas' brief is very concise and is a direct statement of appeal that deals with substance. Pages 2 and 3 of the appeal to the Seventh Circuit complain directly of the erroneous conclusions of the District Court in determining that Mr. Thomas was not selected for termination by illegal means. Mr. Thomas' failure to state the argument in legalese does not diminish the argument or violate the rules of appeal.

8) The Seventh Circuit's dismissing of the appeal, based on the form of the documents, was unwarranted and violation of the concept of a pre se, simple appeal.

CONCLUSIONS

1) The District Court erred in granting the defendant Bliss & Laughlin Steel Company summary judgement on the count of race discrimination and erred in entering judgement for the defendant Bliss & Laughlin on the count of age discrimination.

2) The Seventh Circuit's Order dismissing the appeal adopted the appellee's statement that the appeal was frivolous, contained no request for remedy, and no argument.

3) The appeal to the Seventh Circuit was an honest expression of a request for a remedy and the reasons for the request were not frivolous.

For the reasons set forth above, a Writ of Certiorari should issue to review the judgement and opinion of the Court of Appeals and the District Court.

REMEDY

Mr. Albert Thomas, pro se appellant, prays that the United States Court of Appeals for the Seventh Circuit and the United States District Court for the Northern District of Illinois - Eastern Division be overruled and summary judgement be entered for Mr. Thomas, pro se plaintiff/appellant and against the defendant/appellee Bliss & Laughlin Steel Company for back pay for five years, seven months, punitive damages for willful violation of the Age Discrimination in Employment Act and

Title VII of the Civil Rights Act of 1964, and costs of court.

Subscribed and sworn to before me
this 2 day of May, 1991

NOTARY PUBLIC

OFFICIAL SEAL
LEA F MORRIS
NOTARY PUBLIC STATE OF ILLINOIS
COMMISSION EXP MAY 15,1992

Respectfully submitted,

ALBERT THOMAS, pro se
730 East 155th Court
Phoenix, Illinois 60426
Phone: 1-708-331-1069

APPENDICES

United States Court of Appeals JM

For the Seventh Circuit
Chicago, Illinois 60604
February 14, 1991

Before
Honorable RICHARD A. POSNER, Circuit Judge

No. 90-3215

ALBERT THOMAS, *Plaintiff-Appellant*
v.
BLISS & LAUGHLIN STEEL COMPANY,
Defendant-Appellee

Appeal From The United States District Court For the Northern District of Illinois, Eastern Division:
No. 86 C 9949
Chief Judge James B. Moran

This matter comes before the court for its consideration of the *"MOTION STAY OF MANDATE AND EXHIBITS"* filed herein on February 11, 1991, by the pro se appellant.

The court construes this motion as a motion to reconsider this court's order of February 4, 1991. On consideration thereof,

IT IS ORDERED that said motion is DENIED.

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604
February 11, 1991

No. 90-3215

ALBERT THOMAS, *Plaintiff-Appellant*
v.
BLISS & LAUGHLIN STEEL COMPANY,
Defendant-Appellee

Appeal From The United States District Court For the Northern District of Illinois, Eastern Division:
No. 86 C 9949
Chief Judge James B. Moran

MOTION TO STAY MANDATE FOR LEAVE
FOR WRIT OF CERTIORARI
IN THE UNITED STATES SUPREME COURT
ALTHO, RESPECTFULLY
REQUEST RECONSIDERATION

I, Albert Thomas, appellant and non attorney, hereby certifies that he respectfully *pray* the court *will reconsider* the appellee's motion for *summary affirmance, and the granting of summary affirmance,* on the grounds that the Seventh Circuit has established that the only necessary elements that a plaintiff must show in order to prove a *prima facie* age and race discrimination case in a replacement action are that:

(1) He was a member of the protected class;

> (2) he was qualified for the position; (3) he was terminated; and (4) he was replaced in his position by a younger (or white) person.

Stumpf v. Thomas and Skinner, Inc., 770 F.2d 93, 96 (7th cir. 1985), quoted in *Stratton v. Handy Button Machinery Co.,* 639 F. Supp. 425, 430 (N.D. ILL. 1986).

It is the combination of all the evidence, circumstantial and direct, that deems the appellant's arguments sufficient to support both a finding of age and race discrimination. See E.G., *Graefenhain v. Pabst Brewing Company* 827 F.2d 13, 19-20 (7th cir. 1987).

Even if, the defendant could articulate a reasonable excuse for the discharge, its excuse would still be considered *pretexual* under the law. Citing the Seventh Circuit case of *La Montague, Supra* at 750 F.2d 1414-1415, the Northern District of the United States District Court held in *Grohs,* at 1560, that: evidence which shows that the events were *so far removed in time* that they could not have been the whole cause of the discharge, *or* that the reason given applied with equal force to another employee who was not fired tends to show *pretext.*

In the alternative, should the court not grant the motion for reconsidering and reviewing of the summary affirmance, appellant Albert Thomas, a non attorney, respectfully request a *Stay of Mandate* and sincerely pray for a *Petition of Leave,* to appeal to the Supreme Court of the United States, Case #90-3215. The required statements are attached to.

Appellant, Albert Thomas, a non attorney, *pray* for a *Certificate of Importance,* on the grounds: This case is listed under *I'rima Facia Age and Race Discrimination,*

Stumpf v. Thomas and Skinner, Inc., 770 F.2d 93, 96 (7th cir. 1985), quoted in Stratton v. Handy Button Machinery Co., 639 F. Supp. 425, 430 (N.D. ILL. 1986).

As the Supreme Court stated in *Burdine,* 450 U.S. at 259:

> (Although) the fact that a court may think that the employer misjudged the qualifications of an applicant does not itself expose him to . . . liability . . . This may be probative of whether the employer's reasons are pretext for discrimination.

Graefenhain, Supra at 827 f.2d 21.

Petition the Court of Appeals to review the District Court's decision. 28 U.S. 636(c)(4) and (5). See Adams v. Heckler. 794 F.2d 303, 306 (7th cir. 1986).

In conclusion, appellant Albert Thomas, *pray* that the court will give him back his *life and dignity,* also justice, by reinstating my job, pay back pay of five years and five months, pay willful damages and the cost of court.

Appellant Albert Thomas, certifies that on February 11, 1991, a copy of this statement was served upon:

ATTORNEY CAMILLE A. OLSON
55 East Monroe Street
Suite 4200
Chicago, Illinois 60603

by depositing same in the U.S. Mail, First Class Postage Prepaid.

Albert Thomas

ALBERT THOMAS, pro se
730 East 155th Court
Phoenix, Illinois 60426
Phone: (708) 331-1069

SUBCRIBED AND SWORN TO
BEFORE ME THIS 8 DAY
OF FEB 1991

Lea F Morris
NOTARY PUBLIC

OFFICIAL SEAL
LEA F MORRIS
NOTARY PUBLIC STATE OF ILLINOIS
MY COMMISSION EXP. MAY 15,1992

United States Court of Appeals pb

For the Seventh Court
Chicago, Illinois 60604
February 4, 1991

Before
Honorable Richard A. Posner, Circuit Judge
Honorable Joel M. Flaum, Circuit Judge
Honorable Kenneth F. Ripple, Circuit Judge

No. 90-3215

ALBERT THOMAS, *Plaintiff-Appellant,*
v.
BLISS & LAUGHLIN STEEL COMPANY,
Defendant-Appellee.

Appeal From The United States District Court For the Northern District of Illinois, Eastern Division:
No. 86 C 9949
Chief Judge James B. Moran

This matter comes before this Court for its consideration of the following:

1. "Motion to Dismiss the Appeal" filed January 11, 1991, by counsel for appellee.

2. "Notice of Filing and Certificate of Notice of Response" filed January 22, 1991, by pro se appellant.

Appellee's motion to dismiss the appeal is construed by the Court as a motion for summary affirmance.

This Court has carefully reviewed the final order of the District Court, the record on appeal, appellee's motion, and the appellant's opening brief. Based on this review, the Court has determined that the further filing of briefs would not be helpful to the court's consideration of the issues. *See Mather v. Village of Mundelein,* 869 F.2d 356, 357 (7th Cir. 1989). Accordingly,

IT IS ORDERED that appellee's motion for summary affirmance is **GRANTED** and the District Court is summarily.

United States Court of Appeals

For the Seventh Court
Chicago, Illinois 60604
December 20, 1990

No. 90-3215

ALBERT THOMAS, *Plaintiff-Appellant,*
v.
BLISS & LAUGHLIN STEEL COMPANY,
Defendant-Appellee.

Appeal From The United States District Court For the Northern District of Illinois, Eastern Division:
No. 86 C 9949
Chief Judge James B. Moran

APPELLATE BRIEF

Your Honors, the facts and evidence of this Brief along with the Appendix and all other proof, this case will show within it bias, fraud, and perjury.

The evidence of the facts of August 16, 1989, when the courts said to the defendant, judgement is denied as to count #1.

No evidence of the facts in a written document by the defendant who said the plaintiff had a *temper.* The court said the plaintiff was qualified, and plaintiff's performance was *wholly adequate.*

The facts, the plaintiff was black, and replaced a white general foreman, named Doug Clauson. There were

twelve more foremen that were white, but were no better than the plaintiff.

I do want to say thanks, to the Honorable Judge James B. Moran for allowing the plaintiff to bring this case #86-C-9949 to the Appellate Court.

In the years 1981 and 1982, the defendant told the court that the plaintiff was *better* than Corey or Pokrajac. Plaintiff worked other jobs, but his foreman's pay was *never, never cut.*

Mr. W. P. Daugherty and Mr. Carl Laib are no longer with the Company, even though they were owners.

There were no *written evidence* of facts of disciplinary action on the plaintiff offered to the court. It was all hearsay, hearsay!

Plaintiff signed over 5,000 time sheets between 1969 and 1985. Not *one* was put in the evidence, in the trial on February 5-9, 1990. Time sheets are the employee's work for each day, and *must* be signed by a *foreman*, who was the plaintiff, Albert Thomas. They will also show the amount of work done each day, in each department, at that time.

Plaintiff could not call for the time sheets for the court. Plaintiff could not call for his own witnesses to testify, even though the court read off their names in the beginning of the trial, February 5-9, 1990. The fact is that no witness was called to testify of the evidence of the facts. Plaintiff swears to tell the truth.

The defendant told the court nothing but hearsay and more hearsay! No written documents about the plaintiff,

to the plaintiff from 1969 to 1985, were produced, but plaintiff has documents to prove his qualifications and ability to do the job. Also, documents *from the* defendant saying how valuable he is.

The court denied the defendant count #1 and granted the defendant count #2 in 1989. A document about that was not talked about in the week of the trial, February 5-9, 1990.

We believe the transcript of Case #86-C-9949, will show *fraud, bias,* and *perjury!* Plaintiff had no written documents from the defendant before the charge of an act of discrimination on age and race was filed with the E.E.O.C.

The court said they believe Mr. W. P. Daugherty and Mr. Daugherty's declaration, and *whatever Mr. Daugherty precisely said!*

The plaintiff's 27 years of service was not considered. *Plaintiff has not been able to obtain other work since this case started!*

Plaintiff *prays* that the court will give justice, and *give the plaintiff his job back, his back pay of over five years, and whatever the court feels is justice in damages.*

The court said we are left then, with virtually nothing to support a race discrimination claim, other than the plaintiff's own perception, and we grant dependant's motion for Summary Judgement on count #2. Plaintiff's age discrimination claim, however, rests upon something other than circumstances. That is his testimony regarding his conversation with Daugherty at the time of his layoff. We know that the three persons laid off were

over 40 and that six of the eleven retained were under 50. We know that Hammonds was 34. We know virtually nothing about the eleven retained, other than Hammonds. It does not help plaintiff much that Hammonds took over his responsibilities--apparently one of the others who were retained could have done so, perhaps one of those older than plaintiff, and Hammonds, as plaintiff's supervisor, was presumably better qualified in any event. But we are left with Daugherty's declaration. If plaintiff's testimony is believed, and we are not provided with evidence about those retained which *contradicts* that *declaration!* That combination of circumstances defeats defendant's motion for summary judgement on count #1. *Coston v. Plitt Theatres, Inc.*, 831 F.2d 1321, 1326 (7th Cir. 1987), *cert. denied,* 108 s. ct. 1471 (1988).

CONCLUSION

Defendant's motion for Summary Judgement is denied as to count #1 and granted as to count #2--August 18, 1989.

September 11, 1990, the courts--it is ordered and adjudged that plaintiff take *nothing,* and judgement is entered in favor of defendant, Bliss & Laughlin Steel Company.

FACTS!
DICTIONARY EXPLANATION

Nothing--not anything, no thing, thing that does not exist. Thing of no importance, or value. *Person of no importance!*

I believe that is an oversight by the courts. Thank you.

Albert Thomas

ALBERT THOMAS, pro se
730 East 155th Court
Phoenix, Illinois 60426
Phone: 1-708-331-1069

SUBCRIBED AND SWORN TO
BEFORE ME THIS 2 DAY
OF MAY 1991.

Lea F Morris
NOTARY PUBLIC

OFFICIAL SEAL
LEA F MORRIS
NOTARY PUBLIC STATE OF ILLINOIS
MY COMMISSION EXP. MAY 15,1992

Minute Order Form
(rev. 3/88e)

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Name of Assigned Judge or Magistrate	JAMES B. MORAN	Sitting Judge/Mag. If Other Than Assigned Judge/Mag.	
Case Number	86 C 9949	Date	Aug 18, 1989
Case Title	ALBERT L. THOMAS VS BLISS & LAUGHLIN STEEL COMPANY		

MOTION: [In the following box (a) indicate the party filing the motion, e.g., plaintiff, defendant, 3d party plaintiff, and (b) state briefly the nature of the motion being presented]

Memorandum and Order

DOCKET ENTRY: (The balance of this form is reserved for notations by court staff.)

(1) ☐ Judgment is entered as follows. (2) ☒ [Other docket entry]

Enter Memorandum and Order. Defendant's motion for summary judgment is denied as to count I and granted as to count II. Status hearing set for September 1, 1989 at 9:45am.

(3) ☐ Filed motion of [use listing in "MOTION" box above].
(4) ☐ Brief in support of motion due
(5) ☐ Answer brief to motion due ____ Reply to answer brief due ____
(6) ☐ Hearing ☐ Ruling on ____ set for ____ at ____
(7) ☐ Status hearing ☐ held ☐ continued to ____ ☐ set for ____ ☐ reset for ____ at ____
(8) ☐ Pretrial conference ☐ held ☐ continued to ____ ☐ set for ____ ☐ reset for ____ at ____
(9) ☐ Trial ☐ set for ____ ☐ reset for ____ at ____
(10) ☐ Bench trial ☐ Jury trial ☐ Hearing held and continued to ____ at ____
(11) ☐ This case is dismissed ☐ without ☐ with prejudice and without costs ☐ by agreement ☐ pursuant to ☐ FRCP 4(j) (failure to serve) ☐ General Rule 21 (want of prosecution) ☐ FRCP 41(a)(1) ☐ FRCP 41(a)(2)
(12) ☒ (For further detail see ☐ order on the reverse of ☒ order attached to the original minute order form.)

	No notices required		number of notices: 1
	Notices mailed by judge's staff		date docketed:
X	Notified counsel by telephone		docketing deputy initials: UM
	Docketing to mail notices		date mailed notices:
	Mail AO 450 form		mailing deputy initials: UM
	Copy to judge/magistrate		
	courtroom deputy's initials	Date/time received in central Clerk's Office	

Document # 50

-A 12-

BEST AVAILABLE COPY

IN THE

United States District Court

FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

No. 86 C 9949

ALBERT L. THOMAS, *Plaintiff,*

v.

BLISS & LAUGHLIN STEEL COMPANY, *Defendant,*

MEMORANDUM AND ORDER

Plaintiff Albert L. Thomas brings this action against his former employer, defendant Bliss & Laughlin Steel Company. Thomas charges Bliss & Laughlin with age discrimination, in violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. S621 *et seq.,* and with race discrimination, in violation of Title VII of the Civil Rights Act of 1964, S706, 42 U.S.C. 2000e *et seq.,* and 42 U.S.C. S1981. Plaintiff seeks damages, reinstatement and reasonable costs and attorney's fees. Defendant challenges this action, moves for summary judgement, and asks that plaintiff's complaint be dismissed with prejudice. For the following reasons, defendant's motion for summary judgement is denied as to count I and granted as to count II.

FACTS

We view the facts in the light most favorable to the nonmoving party, here the plaintiff, and provide a summary of the facts.

Plaintiff is black and was born on May 4, 1930. He was first employed by defendant in November, 1958 as a hooker--a laborer, an hourly employee--and within the next eleven years became a punchpress operator and grinder operator in defendant's Harvey, Illinois processing mill. Then, in 1969, plaintiff was promoted to supervisor and became a production turn foreman for two years, a draw bench foreman for two years, a grinding general foreman for eight months, and a semi-finish production foreman for seven years. Defendant had a policy of promoting from within and in April, 1978, plaintiff was promoted to general foreman. However, because of a drop in production or because of inability to do the job, plaintiff was demoted back to supervisor in November, 1978.

Business began to decline in the steel industry in the early 1980's and by 1984 plaintiff had reduced its hourly employees by 58 per cent (from 250 to 105) and its supervisory personnel by 30 per cent (from 23 to 16). In 1982, defendant decided to temporarily reduce the number of supervisors, retaining only those with seniority. Plaintiff was one of three long-term employees removed from supervisory duties at this time. He performed guard duties in the security department for about one year and was called upon to resume his supervisory duties when defendant's business picked up again.

In December, 1969, January, 1971 and January, 1972, plaintiff received a raise as a turn foreman in the production department. In May, 1971, plaintiff received a merit increase as well as a shift differential. Plaintiff also received a raise in April, 1972, when he changed his status from turn foreman in the production department to special finish foreman. Again, in January, 1973,

January, 1974, July, 1974, January, 1975, October, 1975, and July, 1976, plaintiff received a merit increase as a special finish foreman. In June, 1977, August, 1977 and November, 1977, plaintiff received a merit increase as a semi-finish foreman. By February, 1978, plaintiff's job was reclassified and he was upgraded and given a salary increase. Then, in May, 1978, Plaintiff was promoted to general foreman and received a commensurate raise in pay. However, by October, 1978, plaintiff had been demoted to production supervisor, with a resulting loss in pay.

Plaintiff was "written up" in 1978 by his supervisors for being enthusiastic and making an extra effort, as well as for poor planning and poor communications skills (a quick temper). His August, 1978 merit rating review listed among his strengths a "strong desire to get the job done," but also listed among his weaknesses a "need to increase his technical knowledge of the equipment in the area," and a need to strengthen the "team atmosphere between special finish and quality control" (defs. app. to stmt. of mat. facts, exh. 4). A September, 1978 salary review listed examples of machinery that had not been properly set, of down-time that had occurred on various machines, and a relationship between plaintiff and his department, as well as co-workers, that "requires improvement" (def. app., exh. 4).

In April, 1979, December, 1980, January, 1982, October, 1983 and October, 1984, plaintiff received salary increases in his position of production supervisor. He received a performance appraisal in January, 1982, where ratings were given ranging from A to E--A being the highest. Plaintiff was given one A for good personal habits, and several B's for loyalty and accepting company policy, for planning and organizing within the

draw bench department, for working well with most of his peers, for personal development and training, knowing the job well, for double-checking the diesetting operations to verify quality control, and for consistently striving to get the most from his department each day. However, plaintiff received caveats with his grades of B, such as his lacking the basic technical knowledge needed to train employees on equipment, the need to work on coordinating his department with others, and a problem with accepting change or trying something new.

Plaintiff received a grade of C in interpersonal effectiveness, with the comment that he has difficulty maintaining his composure; a C in initiative, with the comment that he did not seek additional responsibilities; a C in communications, with the comment that he was not always attentive; a C in management skills, with the comment that he has trouble with work relationships; and a C in analysis and creativity, with the comment that he needs to rely more on himself and not seek solutions from other people (defs. attach., reply mem.).

In October, 1985, plaintiff was permanently laid off. His insurance benefits were continued during his layoff for a maximum of three months, but at plaintiff's request, the layoff was changed to a termination, which was effective as of October 31, 1985. Plaintiff then received eight weeks severance. Plaintiff's duties were assumed by William Hammonds III, who had worked for defendant since 1981. Hammonds was the lead foreman since 1983 and had supervised plaintiff and the production employees in the draw bench area prior to plaintiff's layoff and eventual termination. Hammonds was white and 34 years old at the time plaintiff was terminated.

It is that termination which is the subject of plaintiff's

claims. He contends that age and race were determinative factors. The defendannt insists that there was a reduction in force from fourteen to eleven supervisors and that Thomas and two others were let go because they, overall, were the weakest of the supervisory force. At the time plaintiff was 55, and the only black supervisor. The other two laid off were white, one age 46 and the other age 47. Of the eleven supervisors retained, five were over 50. The record before the court does not reflect the ages of the others retained, other than Hammonds.

DISCUSSION

Defendant moves for summary judgement and argues that plaintiff does not establish a *prima facie* case that his termination was based on race or age. Plaintiff counters that he has established a *prima facie* case and summary judgement must fail because this is a "classic replacement situation" and not a "job elimination action" or "reduction-in-force" situation, as portrayed by defendants.

A district court should grant a motion for summary judgement only where there is no genuine issue of material fact and the party moving for summary judgement is entitled to judgement as a matter of law. Fed.R.Civ.P. 56(c). The facts and all reasonable inferences which can be drawn from the facts are to be viewed in the light most favorable to the nonmoving party, here the plaintiff. *Matsushita Electric Indus. Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986); *Hermes v. Hein,* 742 F.2d 350, 354 (7th Cir. 1984). Plaintiff must establish evidence sufficient to satisfy the fundamental elements of his claim, *Celotex Corp. v. Cathrett,* 477 U.S. 317, 322 (1985), to avoid summary judgement for the defendants.

See Adickes v. S. H. Kresse & Co., 398 U.S. 144 (1970).

Defendant initially argues that plaintiff cannot meet his *prima facie* burden for either age or race discrimination, as set forth in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973). The *prima facie* burden in both ADEA and Title VII actions is the same. *Id.; La Montagne v. American Convenience Prod., Inc.,* 750 F.2d 1405, 1409 (7th Cir. 1984). This burden continues to be applicable in S1981 as well. *Patterson v. McLean Credit Union,* 109 S.Ct. 2363 (1989).

Plaintiff must show (1) that he belongs to a racial minority (for Title VII actions), and is age 40 or older (for ADEA actions); (2) that he met his employer's legitimate job expectations; (3) that he was fired; and (4) that the job remained open, was filled by a younger person or by a member of a non-protected class. In the context of a "reduction-in-force" case, plaintiff can establish his *prima facie* burden by showing that he was within the protected class, that he met his employer's legitimate job expectations, that he was fired, and "that others not in the protected class were treated more favorably." *Oxman v. WLS-TV,* S46 F.2d 448, 455 (7th Cir. 1988).[1/]

The Seventh Circuit found that the *Oxman* modification of the *McDonnell-Douglas* test allows the plaintiff to reach his *prima facie* burden without having "to uncover that elusive 'smoking gun'." *Id.* at 455-56. If a plaintiff can establish a *prima facie* case under this modification,

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[1/]Oxman specifically overrules Matthews v. Allis-Chalmers, 768 F.2d 1215 (7th Cir. 1985). Although Oxman was decided on May 9, 1988, neither party has notified this court of any possible changes in their briefs due to either Oxman or the myriad of Title VII, S1981 and ADEA recently decided cases.

then the burden shifts to the employer to articulate a nondiscriminatory and legitimate reason for firing plaintiff. *Smith v. General Scanning, Inc.*, 876 F.2d 1315 (7th Cir. 1989). Should defendant articulate a nondiscriminatory and legitimate reason, then the burden shifts back to plaintiff to establish that defendant's reasons were merely a "pretext" for discrimination. *Id. See La Montagne,* 750 F.2d at 1414. *McDonnell Douglas'* second prong is that plaintiff was meeting defendant's legitimate job expectations. Now, in discharge cases, "the more appropriate concern . . . is job performance, into which the question of qualifications merge." *Oxman* at 452 n.2.

Defendant's argument that plaintiff must prove that he was relatively better qualified, that plaintiff must show "more than mere satisfactory job performance," *Schutz v. Western Publishing Co.*, 609 F.Supp. 888, 902 (N.D. 111. 1985), requires that plaintiff rebut defendant's articulated nondiscriminatory and legitimate reasons for firing plaintiff, instead of the other way around. *Oxman* found that these arguments changed the purpose behind *McDonnell Douglas,* which is to "relieve plaintiff of the burden of having to uncover what is very difficult to uncover--evidence of discriminatory intent." *Oxman* at 454. The pre-*Oxman* formulation of the proof needed to establish a *prima facie* showing in a "reduction-in-force" case combines the "pretext" and *"prima facie"* aspects of *McDonnell Douglas* and has been overrulled by *Oxman. Id.*

Viewing the facts in the light most favorable to plaintiff establishes that plaintiff has made a *prima facie* case here for both age and race discrimination. He is both a minority and older than 40; he met the defendant's legitimate job expectations since he regularly received

merit increases up to October, 1984 and was allowed to retain his supervisory pay and status during a downturn in business, when he became a security guard with defendant for one year; he was permanently laid off and subsequently fired in 1985, along with two other supervisors also in the protected class (over 40 years old); and younger white employees were treated more favorably. Now the burden shifts to defendant to articulate a nondiscriminatory and legitimate reason for firing plaintiff. *Smith,* at 1315.

Defendant asserts that in October, 1985, it experienced a "dire economic crises" which made it necessary to reduce personnel (def. mem. in sup. of mo. for sum. jdgmt. at 10). One of plaintiff's supervisors said that plaintiff was laid off in 1985 because he was judged one of the least able foremen. As further evidence of plaintiff's relative job performance, defendant further argues that during the 1982 decrease in business, plaintiff was evaluated as having lower technical and supervisory skills and was one of three foremen who performed guard duties for one year.

Here, defendant has rebutted plaintiff's *prima facie* case with a nondiscriminatory and legitimate reason for laying off and subsequently firing plaintiff. *Oxman* at 453. The courts will not invalidate a business decision made in good faith which selects retained employees on the basis of job performance. *Dorsch v. L. B. Foster Co.,* 782 F.2d 1421, 1426 (7th Cir. 1986).

Although plaintiff asserts that defendant's job performance criteria was subjective, this alone will not change a legitimate business decision into an illegitimate one. *Id.* at 1427. Defendant's strongest argument here is that business concerns forced it to consolidate supervisory positions as an economic measure. *Graefenhein v. Pabst*

Brewing Co., 827 F.2d 13, 19-20 (7th Cir. 1987), *aff'd in part, vacated in part on other grounds*, 870 F.2d 1198 (7th Cir. 1989). On the other hand, defendant has shown the barest evidence that plaintiff was laid off during this consolidation because he was less qualified than others--testimony of plaintiff's supervisors about various job deficiencies and the 1980 and 1982 performance appraisal--the last appraisal being a full three years before plaintiff was laid off and fired.

In order for plaintiff to prevail here and defeat defendant's motion for summary judgement, he must now offer proof that defendant's reasons for laying him off and subsequently firing him were merely a pretext for discrimination. *Oxman* at 453; *La Montague* at 1409. Plaintiff's action consists of two counts. Count I concerns age discrimination and plaintiff must now show that "but for" his age he would not have been laid off and subsequently fired, *La Montagne* at 1409. Count II concerns race discrimination and plaintiff must now show that "but for" his race he would not have been laid off and subsequently fired, *Patterson v. General Motors Corp.*, 631 F.2d 476, 482 (7th Cir. 1980), *cert. denied*, 451 U.S. 914 (1981). A finding that age and race were "determining factors" in defendant's decision to lay off and subsequently fire plaintiff will necessitate a finding that defendant intentionally discriminated against plaintiff, *Burlew v. Eaton Corp.*, 869 F.2d 1063, 1966 (7th Cir. 1989).

Plaintiff must now produce evidence that defendant's decision to discharge plaintiff by permanently laying him off was "motivated by discriminatory reasons or that its proffered explanations are unworthy of credence." *Oxman* at 456. This is a close question here. As evidence that defendant's reasons were mere pretext for intentional discrimination, plaintiff offers this testimony:

(1) that the plant superintendent and manager (Daugherty) told him in a private conversation held on September 27, 1985, that the company wanted to go with the youngest and most educated employees and that because plaintiff was 55 years old, he could take early retirement or file for unemployment compensation; (2) in the same conversation plaintiff testified that Daughterty also told him that the company would verify that plaintiff was a good worker and that he was not being laid off because of his work; (3) that defendant's business has been increasing since 1983; (4) that no black managers or supervisors have been employed by the company; and (5) that this is a classic "replacement" case and not a "reduction-in-force" case. Moreover, to show that defendants' explanations are unworthy of credence, plaintiff argues that he was never formally reprimanded after being spoken to by his superiors about various problems with his men and machines, that he survived other major layoffs during a downturn in business, that he received competent appraisals during his reviews, as well as 23 pay raises, and that the only two other people laid off at the same time were also over 55 years old.

First, this is not a "replacement action" but a "reduction-in-force" case. Defendant permanently laid off two other foremen at the same time as plaintiff. Hammonds has been an employee of defendant since 1981 and was plaintiff's supervisor. Hammonds assumed plaintiff's responsibilities as well as his own--he was not hired merely to replace plaintiff. We must also disregard plaintiff's assertion of a discriminatory incident which occurred 25 years earlier when he asked for a job application form and was turned away, since he was hired that very same day and was employed by defendant for over 25 years. We also disregard defendant's characterization of plaintiff's claims that he was discriminatorily demoted from general foreman in 1978,

and discriminatorily not promoted back to that position as "procedurally defective and substantively meritless" and therefore should be dismissed (mo. for sum. jdgt., fn 6). Finally, we recognize that the small number of supervisors and the lack of evidence respecting the defendant's experience with other supervisors or would-be supervisors makes any statistical evidence irrelevant.

We are left, then, with virtually nothing to support a race discrimination claim other than plaintiff's own perception, and we grant defendant's motion for summary judgement on count II. Plaintiff's age discrimination claim, however, rests upon something other than circumstances. That is his testimony regarding his conversation with Daugherty at the time of his layoff. We know that the three persons laid off were over 40 and that six of the eleven retained were under 50. We know that Hammonds was 34. We know virtually nothing about the eleven retained, other than Hammonds. It does not help plaintiff much that Hammonds took over his responsibilities--apparently one of the others who were retained could have done so, perhaps one of those older than plaintiff, and Hammonds, as plaintiff's supervisor, was presumably better qualified in any event. But we are left with Daugherty's declaration, if plaintiff's testimony is believed, and we are not provided with evidence about those retained which contradicts that declaration. That combination of circumstances defeats defendant's motion for summary judgement on count I. *Coston v. Plitt Theatres, Inc.*, 831 F.2d 1321, 1326 (7th Cir. 1987), *cert. denied*, 108 S.Ct. 1471 (1988).

CONCLUSION

Defendant's motion for summary judgement is denied as to count I and granted as to count II.

James B. Moran

JAMES B. MORAN
Judge, United States District Court

August 18, 1989.

IN THE

United States District Court

FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 86 C 9949

ALBERT THOMAS, *Plaintiff,*
v.
BLISS & LAUGHLIN STEEL COMPANY,
Defendant.

PLAINTIFF'S RESPONSE TO THE DEFENDANT'S MOTION FOR SUMMARY JUDGEMENT AND MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGEMENT

NOW COMES the Plaintiff, ALBERT L. THOMAS, by and through his attorneys, FRITZSHALL & GLEASON, and hereby requests the court to deny the Defendant's Motion for Summary Judgement for the following reasons:

STATEMENT OF THE CASE

For the past 30 years, Bliss & Laughlin Steel Company has not only been in the steel business. Instead, for the past 30 years, Bliss & Laughlin Steel Company has also been in the business of practicing discriminatory processes and procedures against its employees. One employee in particular--Mr. Albert L. Thomas--, the Plaintiff in this case, has decided that after the 27 years of devotion and loyalty that he has given to the Defendant-

Company as an employee and supervisor, and after the 27 years of competent experience and expertise that he has provided to Bliss & Laughlin Steel as a laborer and foreman, and after the 27 years of having no grievances or complaints filed against him,[1/] and, unfortunately, after the 27 years of being demoted in rank,[2/] replaced by less qualified personnel,[3/] refused promotions when deserved, and finally terminated from the company as the *only* black supervisor currently in its employ,[4/] at age 55 Mr. Thomas felt that it was time to tell his story, to seek his damages and to hopefully prevent such discriminatory practices and procedures from occurring by the company in the future.

On December 19, 1986, Mr. Albert L. Thomas filed his Complaint at Law naming Bliss & Laughlin Steel Company as the Defendant in his two-count cause. Specifically, in count I, Mr. Thomas asks for damages pursuant to the provisions of the Age Discrimination in

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[1/](Albert Thomas' Deposition at 108); (Richard Bogdon's Deposition at 15.)

[2/]Albert was demoted from general foreman to foreman in 1978.

[3/]Albert started working for Bliss & Laughlin Steel in 1958. He worked his way up from a laborer position to foreman. He supervised at least five departments at Bliss & Laughlin and received 23 raises from 1969 through 1985. William Hammonds, III, the employee who took over Albert's job responsibilities, started working for Bliss & Laughlin Steel in 1981. He received two raises. William is 21 years younger than Albert, is white and received similar letter ranks as Albert on review.

[4/](Richard Bogdon's Deposition at 65.)

Employment Act, 29 U.S.C., Section 621, et. seq. and in count II of his Complaint at Law; the Plaintiff asks for damages pursuant to the provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C., Section 2000(e), et. seq. and 42 U.S.C. Section 1981.

On August 22, 1988, the Defendant filed its Motion for Summary Judgement and Memorandum of Law in Support thereof. There, the Defendant alleged that: (1) due to the *decline in the United States Steel Industry,* it was necessary to lay off supervisory employees in 1985; (2) Mr. William P. Daugherty, Vice President of Operations, determined to layoff the Plaintiff based on a single overriding criterion--the most qualified supervisors for the work that would be required to be performed based on the supervisor's *experience* and *capabilities;* and (3) the Plaintiff was selected due to his *long-standing deficiencies* in his performance as a supervisor in addition to his relative lack of breadth of knowledge and experience in working in other areas of the plant. *Defendant's Memorandum* at 1-3.

Conversely, the Plaintiff contends that this is *clearly* not a case in which a Summary Judgement Motion should be granted. There are many facts which are disputed in this case which should curtail the granting of a Summary Judgement Motion. It is well settled that in considering a Motion for Summary Judgement, the Court has no duty or function to try or decide factual issues. It's only duty is to determine whether or not there is an issue of fact to be tried. *Stumpf v. Thomas and Skinner, Inc.,* 770 F.2d 93, 97 (7th Cir. 1985); *Stratton v. Handy Button Machine Company,* 639 F. Supp. 425, 429 (N.D. III. 1986); *Hayden v. First National Bank of Mt. Pleasant, Texas,* 595 F.2d 994, 996 (5th Cir. 1979).

Moreover, Rule 56 permits the grant of Summary Judgement *only:*

> if the Pleadings, Depositions, Answers to Interrogatories, and Admissions on file, together with the Affidavits, if any, show that there is *no genuine issue as to any material fact and that the moving party is entitled to judgement as a matter of law.*

Further, the Defendant, in a Summary Judgement Case, is obligated to show in its Motion and Memorandum of Law that such disputes are either (1) not genuine, or (2) not material. *Id.* at 429. Like *Stratton,* the defendant herein has also clearly failed to meet is burden of proof in the case at bar. The Defendant has failed to do such because at the Summary Judgement stage *the burden of proof is on the* moving party, in this case the *Defendant,* to show that the outcome of the trial would be a foregoing conclusion because with discovery complete, the opposing party has turned up *no evidence* of an essential element of his case or defense. *Stratton, Id.,* citing *Backes v. Valspar Corp.,* 783 F.2d 77, 78-79 (7th Cir. 1986).

Moreover, the Seventh Circuit has also proclaimed that "no evidence" means precisely that: It is a cardinal summary judgement principle that the court "may not evaluate the credibility of the witnesses" but must take statements at face value. *Stewart v. RCA Corp.,* 790 F.2d 624, 628-29 (7th Cir. 1986). Further, facts--especially in discrimination cases--do not always trumpet their own full significance. This is because:

> intent (though inherently subjective) must perforce be inferred from its objective manifestations, and people (especially sophisticated ones) frequently mask discriminatory motives if they have them. Not surprisingly in Rule 56 terms the non-moving party is entitled to the benefit of any reasonable inferences that can be drawn from ambiguous fact situations. *(Hermes v. Hein,* 742 F.2d 350, 353 (7th Cir. 1984).

Stratton, Supra at 429.

STATEMENT OF THE FACTS

It all began on November 10, 1958. That was the day that Albert Thomas started working for Bliss & Laughlin Steel Company. On November the 10th, Albert was out of work and needed a job, so he stopped in at the personnel office at Bliss & Laughlin Steel. A man at the office told Albert that they were not taking applications. Exhibit A; (Plaintiff's Deposition Abstract at Page 33.) However, when Albert discovered that two white men had received applications immediately after he had left the personnel office, he demanded to see the Superintendent of the Plant. *(Id.)* The Superintendent hired Albert instantly as a hooker, which was a laborer position. (*Id.* at 36.)

During the next ten years, Albert worked his way up from hooker to punch press operator to grinder operator. (*Id.* at 37-39.) Albert was *never* disciplined during the entire time that he was employed as an hourly employee at Bliss & Laughlin. (*Id.* at 47.)

In 1969, Albert was promoted to supervisor. (*Id.* at 47.) In order to enhance his supervision skills, Albert

completed three courses on Management Skills and Labor Relations. (See Exhibit F attached hereto.) As a supervisor, Albert was a production turn foreman for approximately two years; a special finish foreman for approximately four years; a draw bench foreman for approximately two more years; a grinding general foreman for eight months, and a semi-finish production foreman for approximately seven years. (*Id.* at 54, 102, 81 and 139.) (Also see Exhibit E attached herein.) He received *23 raises* as a foreman from 1969 through 1984. (See Exhibit E.) Albert deposed that he *never* received any discipline during the entire time that he was a supervisor at Bliss & Laughlin. Moreover, he testified that *no* grievances were ever filed against him. (*Id.* at 100 and 108.)

Mr. Daugherty deposed that he had problems with Albert's productivity and inability to do his work *from 1977 until* the time that he was *laid off, which was over eight years later.* Exhibit B; (William Daugherty's Deposition at 83.) Conversely, Mr. Richard Bogdon, the vice-president of Human Resources at Bliss, deposed that if there were ever any complaints made about Mr. Thomas, they would eventually come to his attention. Exhibit C; (Richard Bogdon's Deposition at 14.) Moreover, Mr. Bogdon further testified that normally all of the supervisors' performance appraisals came to him upon completion. (*Id.*) However, Mr. Bogdon could *not* remember a *single* complaint made about Mr. Thomas' work performance. (*Id.*) Nor could Mr. Bogdon recall a *single* grievance that was ever filed against Albert at the level that Mr. Bogdon handled these procedures. (*Id.* at 15.)

Albert's immediate supervisor, Mr. Carl Laib, also deposed that Albert had *positive evaluations* during the

time that he was evaluating Albert. (Mr. Laib's Deposition at 13-14.) For example, in Exhibit #1 of Mr. Laib's Deposition, he recommended that Mr. Thomas receive a raise on February 15, 1978. And in Exhibit #6 of Mr. Laib's Deposition, a December 11, 1980 Appraisal of Mr. Thomas by Mr. Laib, Mr. Laib gave Albert *mostly* "A's", some "B's", and *no* "C's", "D's", nor "E's" in his evaluation of Mr. Thomas. Mr. Thomas received a 5% raise after that review. Exhibit D; (Mr. Laib's Deposition at 48.) In the 1982 Appraisal of Mr. Thomas, marked as Exhibit #7 in Mr. Laib's Deposition and Exhibit #3 in Mr. Thomas' Deposition, Mr. Laib deposed that Mr. Stella evaluated Mr. Thomas at that review and that Mr. Stella was not familiar with making performance appraisals. (*Id.* at 50.) Regarding the 1982 Appraisal, Mr. Thomas testified that he only saw the Appraisal before it was filled out and that he believed that he deserved straight "A's" with possibly one "B" on the Appraisal. Exhibit A; (Albert Thomas' Deposition at 146-172.)

Business started to drop at Bliss between the years of 1979 through 1983.[5/] Exhibit B; (Daugherty's Deposition at 46.) As a result, the plant size was reduced from

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[5/]Between 1977 and 1979, there were approximately 250 people employed at the Harvey Bliss Plant as hourly employees. Exhibit B; (William Daugherty's Deposition at 41.) In addition, there were 23 people employed as Supervisors during those years. (*Id.*) Approximately 50-55% of the hourly employees were black, whereas only approximately 15-20% of the supervisory personnel were black. (*Id.*) Since 1985, 0% of the supervisory personnel at Bliss is black (*Id.* at 65-66.) Regardless, Mr. Daugherty, the plant superintendent and plant manager, deposed that it was his policy to promote employees from within the company. (*Id.* at 36.) Only three people were terminated during the 1985 layoffs. Nevertheless, even if this case were to be considered. In addition, Mr. Daugherty testified that only two general foremen were demoted during his twelve years as a plant manager and plant supervisor at Bliss. Both were black. (*Id.* at 79.) And one of the two general foremen that were demoted was Albert Thomas. (*Id.* at 78.)

approximately 250 hourly employees to 105; and the supervisory personnel dropped from 23 to about 16. (*Id.*) In 1984, there were approximately 14 foremen, only one of which--Albert Thomas--was black. (*Id.* at 67.)

In 1980 and 1982, when business was decreasing at Bliss, it became necessary to eliminate some of the Defendant's personnel. Exhibit D; (Laib's Deposition at 19; Exhibit B; Daugherty's Deposition at 19, 110-111.) The criteria used to eliminate supervisors at that time was based on the company's *seniority system.* Exhibit B; (Daugherty's Deposition at 11.) However, in 1985--when Mr. Thomas was terminated--the company did *not* implement the seniority system. (*Id.* at 103.) Instead, Mr. Daugherty deposed that Mr. Thomas was selected to be fired, due to his *lack of ability.* (*Id.* at 102.)

Again, according to Mr. Daugherty, Mr. Thomas' problems occurred from 1977 until his layoff, regardless of his competent reviews, his constant raises in salary, and his continual employment at Bliss throughout the 1980 and 1982 terminations--steadily from 1958 until 1985. (*Id.* at 83.) Exhibit D; (Laib's Deposition at 13-14 and 38-48.)

On June 5, 1984, Mr. Bogdon wrote a letter to the Honorable Richard J. Fitzgerald stating:

> Please consider a request to relieve Mr. Albert L. Thomas from Jury Duty at this point in time. Mr. Thomas ia a *valuable foreman* in our production areas which are extraordinarily heavy with volume . . .

Exhibit C; (Bogdon's Deposition Exhibit #6; Bogdon's Deposition at 62.)

Just a year later, on September 27, 1985, Albert Thomas was terminated from Bliss & Laughlin Steel Company by Mr. Daugherty. Exhibit A; (Thomas' Deposition at 225.) That was the day that Mr. Daugherty, who first acquired his ownership in the Defendant Company just ten months before the conversation. Exhibit B; (Daugherty's Deposition at 34), told Albert, privately and behind closed doors, that:

> We are going to get into another quarter and we want to go with the *youngest* and most educated people that we have here . . . You are 55 years old and you could take the early retirement . . . It is not *because of your work.* If you get out there and find another job, you just have that individual to call me or Dick Bogdon and *we* will *verify that you are a good worker,* but we have to make this change . . . I considered your seniority, but the way I got it figured, you could just--when you leave here file for your Unemployment, you will have no problem with that, and then you could get in touch with us, and we will set up a monthly basis for your severance allowance, and then you can file for your early retirement . . . .

Exhibit A; (Thomas' Deposition at 226-228.)

Bill Hammonds, III, employed by Bliss in 1981, who was 34 years old at the time of Mr. Thomas' termination, who was white and who also received mostly "B's" and some "A's" on his Performance Appraisal, took over Mr. Thomas' functions in the Semi-Finish Department. Exhibit B; (Daugherty's Deposition at 110); Exhibit D; (Laib's Deposition at 37.)

Since Mr. Thomas has been terminated from Bliss & Laughlin Steel, no black managers or officials have been employed by the company. Exhibit C; (Bogdon's Deposition at 65.) Moreover, according to Richard Bogdon, *business at Bliss has been steadily increasing since 1983.* (*Id.* 9) Yet, Mr. Thomas was terminated in 1985. Moreover, Mr. Bogdon deposed that at the present time, the steel industry is doing quite well. (*Id.* 9) Nevertheless, Mr. Daugherty testified that Mr. Thomas was never asked to return to Bliss; Mr. Laib, Mr. Bogdon, and himself, participated in Albert's review; and that the primary reason for the 1985 layoff was due to the financial health of the business. Exhibit B; (Daugherty's Deposition at 113-114.)

ARGUMENT

I. THE PLAINTIFF HAS ESTABLISHED A PRIMA FACIE AGE AND RACE DISCRIMINATION CASE

Although the Defendant contends in its Memorandum of Law that this is a "job elimination" case, the extensive deposition testimony in this action at bar clearly otherwise. Instead, the Plaintiff alleges and the depositions reveal that this case involves a classic "replacement" situation. (See, e.g., Daugherty's Deposition at 110: "Bill Hammonds, III took over Al Thomas' functions.") The Seventh Circuit has etablished that the only necessary elements that a Plaintiff must show in order to prove a *prima facie* Age and Race Discrimination case in a replacement action are that:

> (1) he was a member of the protected class; (2) he was qualified for the position; (3) he was terminated; and, (4) he was replaced in his position by a younger (or white) person.

Stumpf v. Thomas and Skinner, Inc., 770 F.2d 93, 96 (7th Cir. 1985), quoted in *Stratton v. Handy Button Machinery Co.,* 639 F. Supp. 425, 430 (N.D. III. 1986).

Instead, in the Defendant's Memorandum of Law, it contends that in order to satisfy the Plaintiff's burden, the "Plaintiff must show something more than mere satisfactory job performance. Instead, the focus must necessarily be on Plaintiff's relative qualifications as compared with those of the persons retained." (Defendant's Memorandum of Law at 7.) The case cited by the Defendant for this proposition involved a "reduction-in-force" situation, instead of a classic "replacement" action. See *Schutz v. Western Publishing Company,* 609 F. Supp. 888, 902 (N.D. III. 1985). Moreover, *Schutz* dealt with a situation whereby the Defendant combined *several* of it's territories and functions in light of geographic considerations and the relative budgets of the territories involved. *Id.* at 905.

Conversely, in the case at bar, the Defendant's "reduction-in-force" did not occur in 1985 when Mr. Thomas and two other employees were laid off. Instead, Bliss' "reduction-in-force" occurred between the years of 1979 through 1983. Exhibit B; (Daugherty's Deposition at 46.) At that time, due to business conditions, the Defendant reduced their supervisory personnel by seven or eight from the twenty-three that it had, and it reduced its hourly employees from approximately 250 to 105.

Nevertheless, Albert Thomas was asked to remain at Bliss during it's "reduction-in-force" period. However, just recently, the vice-president of Human Resources deposed that since 1983 *business* for Bliss & Laughlin has started to *increase.* Exhibit C; (Bogdon's Deposition

at 9.) In fact, currently, according to Mr. Bogdon, the steel industry is doing very well. (*Id.*) As a result, it can hardly be argued that the case at bar involves a "reduction-in-force" situation as in *Schultz.*

Nevertheless, even if this case were to be considered a "reduction-in-force" case, comparing Mr. Thomas' qualifications to those employees who were retained in the case at bar would still be sufficient to satisfy the Plaintiff's burden. Mr. Thomas was not eliminated during the 1979 through 1983 terminations; Mr. Thomas has sufficiently more experience and expertise than William Hammonds, III, who was retained to handle Mr. Thomas' functions and, likewise, Mr. Thomas had far more experience and expertise than most, if not all, of the foreman who were retained at Bliss.

Using the correct test that should be applied in the case at bar--a replacement action--the Plaintiff *clearly* establishes a prima facie case because: (1) *he was a member of the protected class* (Albert was 55 years and black at the time of his termination); (2) *he was qualified for the position* (Albert was kept on for 27 years as an employee and 16 years as a foreman at Bliss; he was not terminated during the layoffs between 1979 through 1983 due to poor business conditions, even though Mr. Daugherty deposed that he always felt that Albert had problems with productivity and his work; his performance did *not* deteriorate at all from 1982 through 1985 (Thomas' Deposition at 173); and further, Albert never received any discipline while he was a supervisor at Bliss & Laughlin.) (*Id.* at 100); (3) *he was terminated;* and (4) *he was replaced in his position by a younger person who was white.*

II. PLAINTIFF HAS SHOWN THAT THE DEFENDANT'S EXCUSES FOR HIS PERMANENT LAYOFF WERE PRETEXTUAL JUSTIFICATIONS FOR AGE AND RACE DISCRIMINATION

In an indirect method of proof case, an employer faced with a prima facie case has merely a burden of production. A *Prima Facie* case gives rise to a presumption of discrimination, which the defendant then seeks to rebut by articulating a legitimate nondiscriminatory reason for the discharge. If the defendant produces such a reason, then the Plaintiff must prove that the reason given was merely a pretext to cover discrimination, for example by showing that reason is not believeable or that discrimination was the likely motive. *La Montagne v. American Convenience Products, Inc.,* 750 F.2d 1405, 1409 (7th Cir. 1984), cited in *Grohs v. Gold Bond Building Products,* 627 F. Supp. 1555, 1559 (N.D. III. 1986). As the courts have recognized, virtually any reasonable articulation for the discharge places the burden back on the Plaintiff to show pretext. *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248 (1981), cited in *Grohs, Supra* at 627 F. Supp. 1560.

The Defendant alleged in its Memorandum of Law that "courts have universally recognized that budgetary and economic constraints such as those experienced by Bliss & Laughlin are a legitimate nondiscriminatory reason for an employee's termination." *Defendant's Memorandum* at 10. However, the Defendant cited *no* Seventh Circuit cases for this proposition. In the very recent case of *Khan v. Grothes Metal Forming Systems, Inc.,* which applied Seventh Circuit law, 679 F. Supp. 751, 759 (N.D. III. 1988), the Court disagreed with the Defendant's contention. There, the United States District Court held at 759 that:

> in recent Seventh Court reduction in workforce cases employers have articulated *specific reasons* for terminating each individual employee in addition to general business reasons for initiating the workforce reduction. See e.g. *Bechold v. IGW Systems, Inc.,* 817 F. 20 1282, 1284 (7th Cir. 1987); *McNeil v. Economic Laboratory, Inc.,* 800 F. 20 at 113, (Further citations omitted) . . .
>
> Consequently, defendant's general business reasons are *insufficient* to rebut an inference of age discrimination. Defendants must offer more specific reasons for terminating each individual plaintiff in order to rebut each plaintiff's prima facie case.

Therefore, by stating that because Bliss & Laughlin may have been suffering from budgetary and economic constraints, this is a legitimate nondiscriminatory reason for an employee's termination, the Defendant has *not* made a reasonable articulation for the discharge under recent Seventh Circuit law in order to place the burden back on the Plaintiff to show pretext.

Even if, *arguendo,* the Defendant could articulate a reasonable excuse for the discharge, its excuse would still be considered *pretextual* under the law. Citing the Seventh Circuit case of *La Montagne, Supra* at 750 F.2d 1414-1415, the Northern District of the United States District Court held in *Grohs,* at 1560, that:

> evidence which shows that the events were *so far removed in time* that they could not have been the whole cause of the discharge, *or* that the reason given applied with equal force to

> another employee who was not fired tends to show pretext.

Moreover, the court continued to explain in *Grohs* that:

> unquestionably Grohs has some evidence which tends to show pretext. The incidents of alleged sexual harassment of female employees, for example, came in June, 1981, while Grohs was not discharged until April, 1983. And, while general evidence of job competence used to establish the *prima facie* case cannot merely be repeated in an effort to show pretext, *La Montagne,* 750 F.2d at 1414, nevertheless it is striking that Grohs not ony was not formally reprimanded after the alleged incidents, but also survived one layoff and was given another competent rating and raise.

Likewise, in the case at bar, Albert alleged incidents of unproductivity and related job problems which Mr. Daugherty complained of in his deposition occurred from 1977 until Albert's layoff in 1985. (Daugherty's Deposition at 83.) Because Mr. Thomas was not terminated earlier, especially during the 1980 and 1982 reduction-in-force, this evidence is too "far removed in time" and realistically *cannot* be the whole cause of the discharge. Instead, this evidence clearly reveals pretext.

Moreover, Mr. Thomas was also *never* formally reprimanded after any of the alleged incidents that Mr. Daugherty complained of (Thomas' Deposition at 100; Bogdon's Deposition at 14); he survived other major layoffs; and he was given competent ratings during his reviews, in addition to 23 pay raises. This, too, is *striking* evidence which tends to reveal pretext.

To boot, as the Seventh Circuit recently revealed in *Coston v. Plitt Theatres, Inc.*, 831 F.2d 1321, 1326 (7th Cir. 1987), cert. denied in 108 S. Ct. 1471 (1988), the "clinching evidence" of pretext in this case is the *direct remark* of Daugherty to Albert during the meeting in which Albert was discharged. In *Coston*, the court held at 1326 that:

> according to Coston's (Plaintiff's) testimony Cohen Defendant's Vice President), in summing up the reasons for Coston's discharge, said, "Besides, Sam, *we have to go along with youth.*" While Cohen testified that he made no such remark, the decision regarding whose testimony to credit *was for the jury.*

Likewise, in the case of bar, Daugherty's statement:

> We are going to get into another quarter and we *want to go with the youngest and most educated people* that *we have here . . .*

Exhibit A; (Thomas' Deposition at 226) is also the "clinching evidence in this scenario" that reveals substantial evidence of pretext. Also see *Stratton v. Handy Button Machine Company*, 639 F. Supp. 425, 432 (NN.D. III. 1986), relying upon *Rizzo v. Means Services, Inc.*, 632 F. Supp. 1115, 1128 (N.D. III. 1986 and *Stumpf v. Thomas and Skinner, Inc.*, 770 F.2d 93, 98 (7th ir. 1985).

Contrary to the Defendant's contention at 11 of its Memorandum of Law that laying off "whites and blacks" from comparable positions belies any discriminatory motive, this does not accurately state what the current situation of law is applicable to the case at bar. First, the present action is not simply a Race Discrimination case, but involves Age as well. The Defendants admit in

footnote 3 of its Memorandum that the two other employees that were laid off were both over the age of 45. *Defendant's Memorandum* at 3.[6/] Second, no other black supervisor could have been terminated at the time of Mr. Thomas' expiration because there were no other black supervisors employed by Bliss to terminate. Third, the Defendant's elimination of the three men squarely fits into Daugherty's discrimination motive of wanting "to go with the youngest people" that he had there. Exhibit A; (Thomas' Deposition at 226.) And fourth, the Defendant did not reveal any relevant similarities between the individuals terminated which belie any discriminatory motive. For example, it is not as if the Defendant terminated 12 positions including some younger workers as well.

In addition, the Defendant claims that the "Plaintiff rests his entire age claim upon the sole fact that Hammonds had less seniority than he." *Defendants' Memorandum* at 12. Although seniority alone may not be enough to prove lack of discriminatory intent, this is not the Plaintiff's entire claim in this case. The Plaintiff also emphasizes that he had many years of experience and expertise at Bliss; that he survived previous terminations; that he received competent reviews; that he was never disciplined; and that he regularly and systematically partook in several pay raises. It is the combination of all the evidence, circumstantial and direct, that deems the Plaintiff's arguments sufficient to support both a finding of age and race discrimination. See, e.g., *Graefenhain v. Pabst Brewing Company*, 827

[6/]Except for the owners and upper management, no other full time supervisor at Bliss & Laughlin who was retained in 1985 was as old as Mr. Thomas, according to the documents provided to the Plaintiff and to his attorneys.

F.2d 13, 19-20 (7th Cir. 1987). Further, the inconsistencies in Daugherty's testimony and the personnel records which emphasize "seniority," retain Albert for numerous years without discipline, then eventually let him go, likewise supports Albert's claims of Age and Race Discrimination and suggests significant pretext in the Defendant's excuses. *Id.* at 21-22.

Finally, in the Defendants' summation paragraph, at 13 of its Memorandum of Law, it states that "Plaintiff's layoff resulted from a business decision to restructure and consolidate positions and retain other personnel based on their work experience and work capabilities . . ." It has already been stated repeatedly that the Plaintiff had significant experience, perhaps the most available in the company, and competent work capabilities. Conversely, the man chosen to take over Albert's responsibilities had considerably less experience and capabilities. As the Supreme Court stated in *Burdine,* 450 U.S. at 159;

> (Although) The fact that a court may think that the employer misjudged the qualifications of an applicant does not itself expose him to . . . liability . . . this may be probative of whether the employer's reasons are pretext for discrimination.

Graefenhain, Supra at 827 F.2d 21.

CONCLUSION

As the United States Courts of Appeals has routinely recognized:

> when dealing with employment discrimination

> cases, which usually necessarily involve examining motive and intent, as in other cases which involve delving into the state of mind of party, granting of summary judgement is especially questionable in these cases. Summary judgement should be used cautiously and all procedural requirements given strict adherence . . . - (Citation omitted)

Hayden, Supra at 595 F.2d 997. Because ascertaining intent in discrimination cases "is both sensitive annd difficult;" *U.S. Postal Service Bd. of Governors v. Aikens,* 460 U.S. 711, 716 (1983), in opposing a motion for summary judgement "a plaintiff should be required to do no more than offer proof which casts doubt upon the veracity of the employer's stated reason for its action." (Citations omitted) *Stumpf, Supra* at 770 F.2d 98. *The Plaintiff clearly met his burden in this case by casting doubt on both the factual and legal ramifications of the three pretextual reasons given for his termination; mainly: (1) the steel industry was not declining at the time of the Plaintiff's termination, but, instead, had suffered a possible "decline" several years before; (2) Mr. Daughterty, the recent owner of the Defendant company, who just acquired this interest shortly before the Plaintiff was terminated, was not honestly evaluating the Plaintiff's experience and capabilities when he made his decision to terminate the only black supervisor at Bliss, who was 55 years old and who was competent, capable and experienced, but he was instead using such excuses as pretext for discrimination; and (3) even if the Plaintiff suffered from long-standing deficiencies, these were too far removed in time to have been the whole cause of the discharge. Grohs, Supra* at 627 F. Supp. 1560.

Wherefore, the Plaintiff, ALBERT THOMAS, prays that

this Court deny the defendants' motion for Summary Judgement.

Respectfully submitted,
FRITZSHALL & GLEASON

By Laura L. Lyle
One of its attorneys

FRITZSHALL & GLEASON
309 West Washington Street
Suite 600
Chicago, Illinois 60606
(312) 263-6100

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Name of Assigned Judge or Magistrate	JAMES B. MORAN	Sitting Judge/Mag. If Other Than Assigned Judge/Mag.	
Case Number	86 C 9949	Date	Sept 11, 1990
Case Title	ALBERT THOMAS VS BLISS & LAUGHLIN STEEL CO.		

MOTION: [In the following box (a) indicate the party filing the motion, e.g., plaintiff, defendant, 3d party plaintiff, and (b) state briefly the nature of the motion being presented]

Memorandum and Order

DOCKET ENTRY: (The balance of this form is reserved for notations by court staff.)

(1) ☐ Judgment is entered as follows: (2) ☒ (Other docket entry:)

Enter Memorandum and Order. Judgment is entered for the defendant.

[redacted] for Microfilming

SEP 14 1990

[redacted] on

(3) ☐ Filed motion of [use listing in "MOTION" box above.]
(4) ☐ Brief in support of motion due
(5) ☐ Answer brief to motion due ____ Reply to answer brief due
(6) ☐ Hearing / ☐ Ruling on ____ set for ____ at
(7) ☐ Status hearing ☐ held ☐ continued to ☐ set for ☐ reset for ____ at
(8) ☐ Pretrial conference ☐ held ☐ continued to ☐ set for ☐ reset for ____ at
(9) ☐ Trial ☐ set for ☐ reset for ____ at
(10) ☐ ☐ Bench trial ☐ Jury trial ☐ Hearing held and continued to ____ at
(11) ☐ This case is dismissed ☐ without ☐ with prejudice and without costs ☐ by agreement ☐ pursuant to
☐ FRCP 4(j) (failure to serve) ☐ General Rule 21 (want of prosecution) ☐ FRCP 41(a)(1) ☐ FRCP 41(a)(2)
(12) ☒ (For further detail see ☐ order on the reverse of ☒ order attached to the original minute order form.)

☐	No notices required.		number of notices
☐	Notices mailed by judge's staff.	ED-1 RECEIVED FOR FILING 90 SEP 12 PM 2:27	2 date docketed SEP 13 1990
☒	Notified counsel by telephone.		docketing dpty. initials
☒	Docketing to mail notices.		11 date mld notices SEP 13 1990
☐	Mail AO 450 form.		
☐	Copy to judge/magistrate.		
WHT	courtroom deputy's initials	Date/time received in central Clerk's Office	mailing dpty initials

Document # 73

-A48-

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IN THE

United States District Court

FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

No. 86 C 9949

ALBERT L. THOMAS, *Plaintiff,*

v.

BLISS & LAUGHLIN STEEL COMPANY, *Defendant,*

MEMORANDUM AND ORDER

Plaintiff Albert L. Thomas worked for defendant for almost 27 years. He was, by all accounts, hard-working, dedicated and loyal--a company man who wanted to do a good job and who did at least an adequate job. On September 27, 1985, he was terminated. Since then, despite his efforts to do so, he has been unable to secure comparable employment. He believed that age played a role in his termination and he brought this ADEA action. A jury could not agree on a verdict and the parties decided to leave the decision to this court. We urged the parties to settle the case, they tried to do so and they were unsuccessful. We therefore must decide, and it is this court's duty, based upon the evidence, to find for the defendant.

We do not reach that conclusion lightly. To supplement the court's recollection and notes, we have read a rough draft transcript of the entire trial. Plaintiff, who is obviously a proud man, gave his full measure to the company for over a quarter of a century. When the

company fell upon lean times it looked solely to management's perceptions of what would maximize economic efficiency and not at all to the human costs to long-time and loyal employees. That it had a right to do and, indeed, that is the classic model for an efficient economic system. That model sometimes leaves, however, and left here, economic deprivation and humiliation in its wake.

Defendant is a modest-sized processor of steel products. Steel comes into the plant and there may be subjected to one or more processes before it is shipped to customers. It enters through rough storage and it may pass through drawbench, semi-finish or special finish. Overall operations include: inspection, maintenance and shipping. Plaintiff went to work for the company in 1958. He became a supervisor in special finish in 1969, a supervisor in drawbench about six years later, and then special finish general foreman in 1978. That experience was short-lived, as the evidence is virtually undisputed that the company was dissatisfied with his performance in that capacity, and reasonably so. It demoted him back to line supervisor, and he remained in that job until 1985. Until his tenure as general foreman, his performance was wholly adequate; he would not otherwise have been promoted to general foreman. That tenure triggered a number of comments and evaluations in which his planning and scheduling, his temper, his relationship with the inspection department and his subordinates, and his equipment handling were all, to some degree, called into question. Plaintiff did not believe he had discussed his 1978 merit rating review with his supervisors, nor did he recall reviewing and discussing later evaluations. We believe that he did so--their purpose, after all, was both to inform management and provide a basis for salary reviews and also to inform the employee

so as to encourage constructive change. We do not think plaintiff meant to be untruthful; we do believe that he has a tendency to reject and block out criticisms with which he does not agree.

The 1978 events have, however, only a marginal relevance to this lawsuit, although some of the comments have some echoes in 1985. After his demotion, plaintiff returned to line supervision. In 1979, he was described as having made considerable gains in meeting his production goals and as a "solid citizen," although he was too quick to lose his temper. In 1980, he merited an average salary increase, based upon a new and more elaborate evaluation system. He met or exceeded job requirements in all categories, with notations that he required increased job knowledge, was getting along much better with co-workers, was very conscientious and required better communication concerning an equipment failure. The results in 1982 were more mixed, with negative comments about his temper, his lack of innovation, and problems with relationships, self-reliance, and attention.

The main focus of this lawsuit begins in 1982. Defendant's business was down, and a number of employees were laid off. Plaintiff was not laid off but was, instead, transferred to security and time-keeping duties. Two of his fellow supervisors, namely Michael Pokrajac and Michael Corev, were laid off without transfer. Pokrajac was later recalled and Corey returned as a new hire in 1983. The plant manager, Carl Laib, testified that Pokrajac was actually laid off after plaintiff, but by then plaintiff had the time-keeping slot and there was no lateral transfer then available. He also testified that the 1982 layoff had a positive impact upon Pokrajac's work performance. The scenario lends support, however, to

the view that in 1982 plaintiff was viewed as more valuable than Corey and at least as valuable as Pokrajac, if not more so. Two other supervisors, Kenneth Williams and Al Jabaay, were also kept on as guards during the layoff.

The following year, the plant was on strike for several months and operated with management personnel. Plaintiff's immediate supervisor, William Hammonds III, and Laib both testified that plaintiff ran a straightener machine during that period and from time to time needed help on setting it up. We credit that testimony. Supervisors do not generally do setup; that is the operator's responsibility. It is helpful, however, if a supervisor can help an operator with a setup problem, as it minimizes downtime.

Business was again sour in 1985. The plant had not had, for a number of years, a strong business upturn, and the workforce had many employees with long experience. There were then thirteen supervisors. The company considered a number of cost-cutting measures and one ultimately adopted was the permanent layoff (a euphemism for termination) of three supervisors. Of the thirteen supervisors, one was chief inspector, two were general foremen, one was maintenance superintendent, two were maintenance supervisors, and one (Hammonds III) was plaintiff's supervisor and by all accounts a particularly talented employee. Plaintiff was not qualified to move into any of those positions. It can be argued that the company should have eliminated more of those slots (and it did terminate a maintenance supervisor) and have kept plaintiff as a production supervisor. The evidence does not aupport, however, in any respect that age played any role in the decisions to retain certain job functions. One of the other production

supervisors whose father was retained *was William Hammonds, Jr.,* who was 56, a year older than plaintiff. Al Jabaay, a production supervisor, was also terminated. The real issue then comes down to whether age was a determining factor in terminating plaintiff and keeping Corey (age 32), Pokrajac (age 41), and Kenneth Williams (age 44).

A complicating factor is that there were, for whatever reason, no performance evaluations after 1982. In 1981 and 1982, all three had marginally better evaluations than plaintiff, although defendant agrees that plaintiff was a better performer than Corey in 1982. Pokrajac, we are told, was a considerably improved employee after the 1982 layoff. We have to compare, because it is undisputed that none of the three terminated supervisors were replaced. All three are younger than plaintiff, one (Corey) by a good number of years. But Hammonds, Jr. was retained, and almost all of the supervisors, including those retained, were in their forties and fifties. The selection decision was primarily that of Carl Laib and William P. Daugherty, the general superintendent, although Richard Bogdon, vice-president of Human Relations, was somewhat involved. In addition, Hammonds III had knowledge of the performance of plaintiff, Pokrajac and Williams. A composite of their testimony is that Jabaay and the other terminated supervisor, Earl Kuyper, had experience only in their particular areas. The company, having to cover all bases with just ten supervisors, needed versatile people who could move around and fill in. Plaintiff had more versatility than they but had weaker technical skills and overall flexibility than Pokrajac, Corey and Williams, and had some relationship problems with his employees. He had a tendency to lose his composure and to oversupervise experienced employees. Pokrajac had a tendency to be

indecisive in discipline, but he had otherwise developed into a technically strong and aggressive supervisor with good customer knowledge. He had chief inspector experience as well. Williams had strong skills in maintenance as well as general supervision, was intelligent, and was good technically. Corey was only marginally better than plaintiff, but he also was in special finish, and much of the business was there. He would have been the next to go.

Plaintiff was qualified and he was terminated. We cannot say, however, that the evidence of comparable qualifications establishes that the defendant preferred less qualified employees for reasons of age and that its stated legitimate reasons are therefore pretextual. Plaintiff's indicated weaknesses have, indeed, some support from prior evaluations, ancient though they may have been.

By far, plaintiff's strongest support for his contention that age was a determining factor is a statement he attributes to Daugherty on September 27, 1985, when he told plaintiff of the decision. According to plaintiff, Daugherty said the company was going to keep the youngest and most educated people. Daugherty denies so stating, but we conclude that something very similar was said. We do not conclude, however, that the statement meant that age as such was a determining factor. The company needed flexible people. We observed plaintiff at trial; we heard him testify. He came through as a thoroughly honorable person who was somewhat rigid and somewhat set in his ways and who had some difficulty in adapting and changing on the basis of new information if it did not conform to his then perceptions. *Whatever Daugherty precisely said, we believe* that it was an expression, however inartfully phrased, of the company's desire for maximum flexibility

and his conclusion that plaintiff did not provide it. Plaintiff has every reason to believe that he was far more loyal to the company than the company was to him, but we do not conclude that age was a determining factor in defendant's decision.

Judgement is entered for the defendant.

James B. Moran

JAMES B. MORAN,
Judge, United States District Court

September 11, 1990.

United States District Court

FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 86 C 9949

ALBERT L. THOMAS
v.
BLISS & LAUGHLIN STEEL COMPANY

JUDGEMENT IN A CIVIL CASE

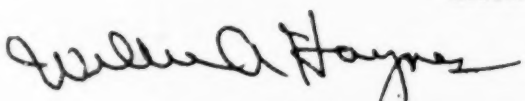
☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that plaintiff take nothing, and judgement is entered in favor of defendant, BLISS & LAUGHLIN STEEL COMPANY.

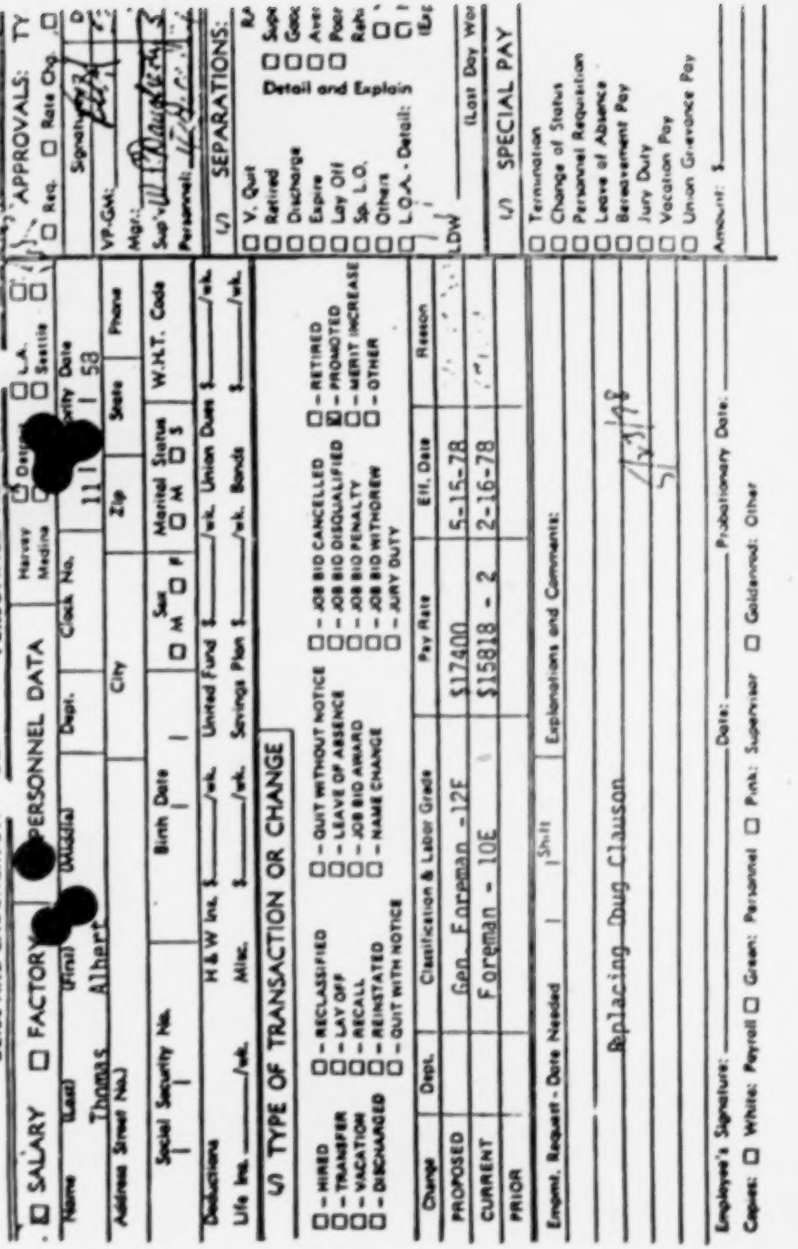
September 11, 1990

H. STUART CUNNINGHAM
Clerk



WILLIE A. HAYNES
(By) Deputy Clerk

EXHIBITS



BLISS AND LAUGHLIN STI BLI PERSONNEL TRANSACTI NOTICE

☐ SALARY ☐ FACTORY PERSONNEL DATA ☐ Dayton ☐ L.A. ☐ Seattle

APPROVALS: TY

Name (Last) Thomas (First) (Middle) Albert Dept. Clock No. 111 Seniority Date 1 58

☐ Req. ☐ Rate Chg.

Address (Street No.) City Zip State Phone

Social Security No. Birth Date Sex ☐ M ☐ F Marital Status ☐ M ☐ S W.H.T. Code

Deductions H & W Ins. $ /wk. United Fund $ /wk. Union Dues $ /wk.

Life Ins. /wk. Misc. $ /wk. Savings Plan $ /wk. Bonds $ /wk.

Signed:

VP-GM:

Mgr:

Supervisor:

Personnel:

☐ SEPARATIONS:

☐ V. Quit ☐ Retired ☐ Discharge ☐ Expire ☐ Lay Off ☐ Sp. L.O. ☐ Others ☐ L.O.A. - Detail:

Detail and Explain

☐ TYPE OF TRANSACTION OR CHANGE

☐ – HIRED ☐ – TRANSFER ☐ – VACATION ☐ – DISCHARGED

☐ – RECLASSIFIED ☐ – LAY OFF ☐ – RECALL ☐ – REINSTATED ☐ – QUIT WITH NOTICE

☐ – QUIT WITHOUT NOTICE ☐ – LEAVE OF ABSENCE ☐ – JOB BID AWARD ☐ – NAME CHANGE

☐ – JOB BID CANCELLED ☐ – JOB BID DISQUALIFIED ☐ – JOB BID PENALTY ☐ – JOB BID WITHDREW ☐ – JURY DUTY

☐ – RETIRED ☐ – PROMOTED ☐ – MERIT INCREASE ☐ – OTHER

Change	Dept.	Classification & Labor Grade	Pay Rate	Eff. Date	Reason
PROPOSED		Gen. Foreman -12F	$17400	5-15-78	
CURRENT		Foreman - 10E	$15818 - 2	2-16-78	
PRIOR					

LDW _____ (Last Day Wor

☐ SPECIAL PAY

☐ Termination
☐ Change of Status
☐ Personnel Requisition
☐ Leave of Absence
☐ Bereavement Pay
☐ Jury Duty
☐ Vacation Pay
☐ Union Grievance Pay

Amount: $

Empl. Request - Date Needed | Shift | Explanations and Comments:

Replacing Doug Clauson

Employee's Signature: _____ Date: _____ Probationary Date: _____

Copies: ☐ White: Payroll ☐ Green: Personnel ☐ Pink: Supervisor ☐ Goldenrod: Other

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NOTICE

I am pleased to announce that effective today, May 15, 1978, Mr. Al Thomas is promoted to the job of General Foreman, Special Finish Department. Please extend your usual good cooperation to Mr. Thomas in this new endeavor.

William P. Daugherty

William P. Daugherty
General Superintendent

WPD/lmh

cc: Local Union
All Bulletin Boards

Bliss & Laughlin steel
Leading Producer of Cold Finshed Steel Bars
281 E. 155th Street, Harvey, Illinois 60426 (312) 264-1800

June 5, 1984

The Honorable Richard J. Fitzgerald
Judge of the Circuit Court
of Cook County, Illinois
Criminal Court
2650 S. California Avenue
Room 3A00
Chicago, Illinois 60608

Sir:

Please consider a request to relieve Mr. Albert L. Thomas from Jury Duty at this point in time. Mr. Thomas is a valuable foreman in our production areas which are extraordinarily heavy with volume and this is further compounded with prime vacation time for all of our other supervisors and Mr. Thomas.

We thank you in advance for any consideration given to our request.

Very truly yours,
BLISS & LAUGHLIN STEEL
Richard M. Bogdon
Richard M. Bogdon
Industrial Relations Manager

IN THE

Supreme Court of the United States of America

OCTOBER TERM, 1990

No. _____

ALBERT THOMAS,

Petitioner,

v.

BLISS & LAUGHLIN STEEL CO.,

Respondent,

PROOF OF SERVICE

I, Albert Thomas, do swear or declare that on this date, May 13, 1991, persuant to Supreme Court Rules 29.3 and 29.4, I have served three attached petitions for a Writ of Ceriorari on each party to the above proceeding, or that party's counsel, and on every other person required to be served by depositing an envelope containing the above documents in the United States Mail properly addressed to each of them and with first-class postage prepaid.

The names and addresses of those served are as follows:

ATTORNEY CAMILLE A. OLSON,
Suite 4200, 55 East Monroe Street, Chicago, Illinois 60603

Albert Thomas

ALBERT THOMAS, pro se
730 East 155th Court
Phoenix, Illinois 60426
Phone: 1-708-331-1069

SUBSCRIBED AND SWORN TO BEFORE ME
THIS 10 DAY OF MAY 1991

Lea F Morris

NOTARY PUBLIC

OFFICIAL SEAL
LEA F MORRIS
NOTARY PUBLIC STATE OF ILLINOIS
MY COMMISSION EXP. MAY 15,1992

No. 90-1752

Supreme Court, U.S.
FILED
JUN 14 1991
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1990

ALBERT THOMAS,

Petitioner,

vs.

BLISS & LAUGHLIN STEEL CO.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

WILLIAM R. SULLIVAN, JR.
Counsel of Record
CAMILLE A. OLSON
TIMOTHY P. PAYNE
SEYFARTH, SHAW, FAIRWEATHER & GERALDSON
Attorneys for Respondent
Suite 4200
55 East Monroe Street
Chicago, Illinois 60603
(312) 346-8000

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QUESTION RESTATED

Whether this Court should review a factual determination made by the United States District Court for the Northern District of Illinois that was affirmed by the United States Court of Appeals for the Seventh Circuit?

STATEMENT REQUIRED BY RULE 29.1

Respondent Bliss & Laughlin Steel Company is a subsidiary of Bliss & Laughlin Industries Inc. More than 10 percent of Bliss & Laughlin Industries Inc.'s issued and outstanding stock is owned by Stelco, Inc., which is a publicly held corporation, and Mr. Gregory Parker, an individual.

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No. 90-1752

In The

Supreme Court of the United States

October Term, 1990

ALBERT THOMAS,

Petitioner,

vs.

BLISS & LAUGHLIN STEEL CO.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

The petition for writ of certiorari is meritless. The United States District Court for the Northern District of Illinois, after a full trial on the merits, held that respondent's stated reasons for terminating petitioner were not pretextual and that age was not a determining factor in respondent's decision to terminate petitioner's employment. After a careful review of the entire record on appeal, the United States Court of Appeals for the Seventh

Circuit affirmed that holding. Petitioner presents no issue appropriate for review by this Court. *See* Supreme Court Rule 10.1.

COUNTERSTATEMENT OF THE CASE

On December 12, 1986, petitioner filed a two-count complaint with the United States District Court for the Northern District of Illinois, Eastern Division (Docket No. 86 C 9949). Count I of petitioner's complaint alleged that Bliss & Laughlin Steel Company had discharged petitioner on the basis of his age in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621, *et seq.* Count II of petitioner's complaint alleged that petitioner was discharged on the basis of his race in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* and 42 U.S.C. § 1981.

On August 18, 1989, in a lengthy opinion by Chief Judge James B. Moran, the District Court for the Northern District of Illinois granted respondent's motion for summary judgment with regard to Count II of petitioner's complaint and denied summary judgment with regard to Count I. The District Court found that there was no evidence to support a race discrimination claim other than petitioner's own perception, and thus dismissed Count II (Petitioner's Appendix, A24). With regard to Count I, petitioner alleged that at the time of his termination, respondent's manager stated, "the Company had decided to go with the youngest and best educated employees." (A23). The District Court determined that taking petitioner's testimony as true for the purposes of the motion, it was sufficient to defeat the motion for summary judgment (A24). The case thereafter proceeded to trial on the merits of Count I of petitioner's complaint.

After a full trial on petitioner's allegations of age discrimination, the jury did not reach a verdict. By agreement,

the parties allowed the court to render a decision. The court found in favor of respondent and issued a memorandum and order on September 11, 1990 (A47).

The District Court found that petitioner's strongest support for his claim of age discrimination was the statement allegedly made by respondent's manager at the time petitioner was informed of his termination. The court concluded that some statement was, in fact, made. However, the court made a specific factual determination that the statement was an expression of the company's desire for maximum flexibility and the manager's conclusion that the petitioner did not provide it, rather than an expression of age bias (A52). The court also stated that after observing petitioner at trial and hearing him testify, the court found petitioner to be a thoroughly honorable person who was somewhat rigid, set in his ways, and who had some difficulty in adapting and changing on the basis of new information if it did not conform to his then perceptions (A52). The court, therefore, concluded that the manager's statement did not support petitioner's allegations that age was a determining factor in his termination (A53).

On December 26, 1990, petitioner filed a brief and short appendix with the United States Court of Appeals for the Seventh Circuit requesting review of the District Court's order of August 18, 1990 granting respondent's summary judgment with regard to Count II of petitioner's complaint and the September 11, 1990 memorandum and order granting judgment to respondent on Count I. On January 11, 1991, respondent filed a motion to dismiss petitioner's appeal to the Seventh Circuit, on the bases that petitioner's appeal did not comply with Federal Rule of Appellate Procedure 28, and it did not specify any error in the District Court's decision. Petitioner filed a brief in opposition to respondent's motion to dismiss on January 17, 1991.

On February 4, 1991, the Seventh Circuit Court of Appeals issued an order stating that it construed the motion to dismiss as a motion for summary affirmance (A6). The order stated that the court had carefully reviewed the final order of the District Court, the record on appeal, the respondent's motion and the petitioner's opening brief (A7). The order also stated that based on its review of the entire record, no further briefing would be helpful to its consideration of the issues. Based on the entire record, the Seventh Circuit granted summary affirmance of the District Court's decision (A7).

On February 14, 1991, the Seventh Circuit denied petitioner's motion for reconsideration of the Seventh Circuit's February 4, 1991 order summarily affirming the District Court's decision (A1).

REASONS FOR DENYING THE WRIT

The petition does not set forth any issues which are appropriate for this Court's consideration. *See* Supreme Court Rule 10.1. Petitioner does not raise any issues about which there is a conflict among the federal courts of appeals, nor does he request this Court settle an important issue of federal law. Rather, petitioner merely requests that this Court review a factual determination of the District Court that was affirmed by the Seventh Circuit Court of Appeals.

1. In a well-reasoned opinion, the District Court made an evidentiary conclusion that the stated reasons for petitioner's layoff and termination were not pretextual and that age was not a determining factor in the company's decision (A47-A53). After a careful review of the record, the District Court's decision was summarily affirmed by the Seventh Ciruit (A6, A7).

Petitioner's principal contention is that the District Court erred in its evidentiary determinations. In particular, petitioner

asserts that the District Court erred by not finding that a statement allegedly made by respondent's manager established that age was a determining factor in respondent's decision (Petition, 4, 5). Thus, petitioner's dispute is purely an issue of factual determination.

This Court has long pronounced that it will not review findings of fact by courts below in the absence of a very obvious and exceptional showing of error. *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987); *Rodgers v. Lodge*, 458 U.S. 613, 622-623 (1982); *Blau v. Lehman*, 368 U.S. 403, 408-09 (1962); *Berenyi v. Director of Immigration and Naturalization Service*, 385 U.S. 630, 635 (1967). In *Berenyi*, this Court explained why it is reluctant to disturb factual determinations:

> This court possesses no emperical expertise to set against the careful and reasonable conclusions of lower courts on purely factual issues. When, as here, resolutions of the disputed factual issues turns largely on an assessment of the relative credibility of the witnesses whose testimonial demeanor was observed only by the trial court, the rule has particular force.

Berenyi, 385 U.S. at 636.

In the instant case, after hearing the testimony of both petitioner and the manager, the District Court determined that the alleged statement, whatever was said, was an expression of the company's desire for maximum flexibility and the manager's conclusion that petitioner did not provide it, rather than an expression of age bias (A52). Specifically, the District Court concluded:

> By far, plaintiff's strongest support for his contention that age was a determining factor is

> a statement he attributes to Daugherty on September 27, 1985, when he told plaintiff of the decision. According to plaintiff, Daugherty said the company was going to keep the youngest and most educated people. Daugherty denies so stating, but we conclude that something very similar was said. We do not conclude, however, that the statement meant that age as such was a determining factor. The company needed flexible people. We observed plaintiff at trial; we heard him testify. He came through as a thoroughly honorable person who was somewhat rigid and somewhat set in his ways and who had some difficulty in adapting and changing on the basis of new information if it did not conform to his then perceptions. *Whatever Daugherty precisely said, we believe* that it was an expression, however inartfully phrased, of the company's desire for maximum flexibility and his conclusion that plaintiff did not provide it. Plaintiff has every reason to believe that he was far more loyal to the company than the company was to him, but we do not conclude that age was a determining factor in defendant's decision.
>
> Judgement is entered for the defendant.

(A52-53, emphasis in original.)

Such determinations were clearly within the District Court's discretion and were not in error. Petitioner does not set forth any reasons that the District Court's conclusions were very obviously in error. After careful review of the record and petitioner's brief, the Seventh Circuit Court of Appeals refused to disturb any of the District Court's factual determinations (A6, A7). Therefore, no exceptional error being present in this case,

additional review by this Court is inappropriate.[1]

2. Petitioner's second and third Questions Presented for Review are entirely based on petitioner's misunderstanding of the appellate court's ruling. Petitioner claims that the Seventh Circuit dismissed his appeal as frivolous based on form rather than substance, and in violation of the concept of simple appeal (Petition, 5). A review of the record, however, reveals that no such ruling was ever made by the Seventh Circuit.

Respondent filed a motion to dismiss petitioner's appeal, claiming that petitioner's appeal was meritless because it was lacking in both form and substance. Petitioner filed a brief in response to respondent's motion. After carefully reviewing the record below, respondent's motion, and petitioner's briefs, the Seventh Circuit determined that further briefing would not be helpful to its consideration of the issues (A6, A7). Instead, based on its *sua sponte* review of the entire record, the Seventh Circuit Court of Appeals affirmed the District Court's opinion (A6, A7). Thus, contrary to petitioner's belief, the Seventh Circuit affirmed the District Court's decision following a thorough review of the merits, not on a procedural basis.

Therefore, petitioner's claim that the Seventh Circuit improperly dismissed petitioner's appeal on a procedural ground is a misintepretation of the Seventh Circuit's decision in this case

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1. It is unclear whether petitioner seeks review of the District Court's decision granting summary judgment in favor of respondent with regards to petitioner's allegation of race discrimination. Petitioner does not set forth this issue in the Questions Presented for Review, nor does petitioner explain any error committed by the courts below. Rather, petitioner merely asserts that the District Court erred in its decision (Petition, 6). Notwithstanding petitioner's failure to properly raise this issue, such an issue is improper for review by this Court for the same reasons set forth above with regards to petitioner's request for review of the decision on his age discrimination claim.

and petitioner's second and third Questions Presented for Review request this Court to review a decision which, in fact, was never rendered.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

WILLIAM R. SULLIVAN, JR.
Counsel of Record
CAMILLE A. OLSON
TIMOTHY P. PAYNE
SEYFARTH, SHAW,
FAIRWEATHER &
GERALDSON
Attorneys for Respondent
Suite 4200
55 East Monroe Street
Chicago, Illinois 60603
(312) 346-8000

Dated: June 14, 1991

Supreme Court, U.S.
FILED
JUN 20 1991
OFFICE OF THE CLERK

NO: 90-1752 (3)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ALBERT THOMAS ——— PETITIONER

vs.

BLISS & LAUGHLIN STEEL CO. — RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

S U P P L E M E N T A R Y A P P E N D I X

ALBERT THOMAS PRO SE
730 EAST 155TH COURT
PHOENIX, ILLINOIS 60426
PH: 1-708-331-1069

S U P P L E M E N T A R Y
A P P E N D I X

United States Court of Appeals

For the Seventh Court
Chicago, Illinois 60604

No. 90-3215

ALBERT THOMAS, *Plaintiff-Appellant,*
v.
BLISS & LAUGHLIN STEEL COMPANY,
Defendant-Appellee.

Appeal From The United States District Court For the Northern District of Illinois, Eastern Division:
No. 86 C 9949
Chief Judge James B. Moran

MOTION TO DISMISS THE APPEAL

Appellee, *Bliss & Laughlin Steel Company* (hereinafter referred to as the "Company"), respectfully requests the Court enter an order dismissing appellant Albert Thomas' appeal on the grounds that it is frivolous and, hence, does not invoke this Court's jurisdiction. In support of this Motion, the Company states as follows:

1. Following this Court's grant of appellant Thomas' requests for extension of time in which to file a Brief in support of his appeal, on December 26, 1990, Thomas filed a two-page Brief (and appendix).[1/]

[1/] A true and correct copy of the Brief is attached hereto.

2. The Brief does not satisfy the requirements of Federal Rule of Appellate Procedure 28 in that it does not contain: a Table of Contents, a Table of Cases, an Argument, or a short Conclusion stating the precise relief requested. In addition, the Brief does not satisfy the requirements of Circuit Rule 28 in that it does not contain: a Jurisdictional Statement, a Statement of Facts, or any references to the pages of the record.

3. In addition, the brief does not contain any citations to legal authorities, [2/] and does not specify any error in the District Court's decision. The entire Brief is one and one-half pages of hard-to-follow narrative. There is no legal argument. As this Court has previously stated, "[s]o naked a submission is frivolous per se." *Brooks v. Allison Division of General Motors,* 874 F.2d 489, 490 (7th Cir. 1989). *See Mays v. Chicago Sun-Times,* 865 F.2d 134, 138 (7th Cir. 1989); *Mitchel v. General Electric Co.,* 689 F.2d 877 (9th Cir. 1982).

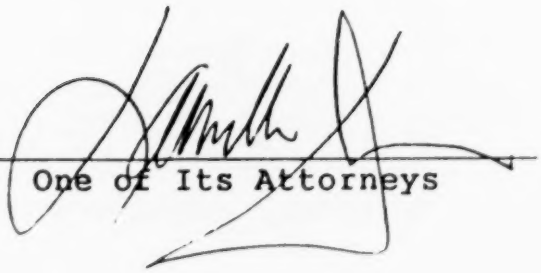
[2/]The citation to *Coston v. Plitt Theatres, Inc.,* 831 F.2d 1321, 1326 (7th Cir. 1987), *cert. denied,* 108 S. Ct. 1471 (1988) is within a paragraph quote from the District Court's decision granting summary judgement on Thomas' race discrimination in termination from employment claim, but denying summary judgement on Thomas' age discrimination in employment claim. After a full trial on the merits, the District Court issued a decision in favor of the Company on Thomas' age discrimination claim.

WHEREFORE, because Thomas' brief is frivolous, the Company respectfully requests that the Court issue an order dismissing Thomas' appeal. In the alternative, should the Court not dismiss Thomas' appeal, the Company requests that it be given thirty days from the

date of this Court's decision on this motion to respond to his appeal.

Respectfully submitted,

BLISS & LAUGHLIN
STEEL COMPANY

By 
One of Its Attorneys

William R. Sullivan
Camille A. Olson
SEYFARTH, SHAW, FAIRWEATHER
& GERALDSON
Suite 4200
55 East Monroe Street
Chicago, Illinois 60603
(312) 346-8000

Dated: January 11, 1991

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